



September 6, 2016

Marlene H. Dortch, Esq.  
Secretary  
Federal Communications Commission  
445 12th Street SW  
Washington DC 20554

Re: Written Ex Parte Communication, MB Docket No. 16-41

Dear Ms. Dortch:

In the above-referenced proceeding, the American Cable Association (ACA) urges the Commission to modify its rules governing retransmission consent by restricting broadcasters' ability to negotiate carriage for multiple channels of programming and the placement of such programming.<sup>1</sup> The Commission should deny these requests. ACA members' decision to "opt out" of system upgrades for their own business reasons cannot serve as a basis for rule changes that benefit ACA members and disadvantage consumers and others. ACA members will be best served by taking steps to expedite their transition to digital operations and expand available bandwidth so that they can broaden service offerings and comply with Commission rules and policies that protect consumers—rules that ACA and its members frequently obtain waivers or exemptions from today.

A recent ACA ex parte notice repeatedly references retransmission consent agreements with broadcasters and the scope of the Commission's authority under Section 325 of the Act.<sup>2</sup> However, the FCC specifically has instructed parties *not* to propose modifications to rules governing retransmission consent in this proceeding, and to direct such proposals to a separate proceeding concerning the FCC's "totality of the circumstances" standard for good faith retransmission consent negotiations.<sup>3</sup> Recently, a post on the FCC's official blog

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<sup>1</sup> Letter to Marlene H. Dortch, FCC Secretary from Michael Nilsson, Harris Wiltshire & Grannis LLP, counsel for ACA, MB Docket No. 16-71 (Aug. 26, 2016) ("ACA Aug. 26 Ex Parte").

<sup>2</sup> See, e.g., ACA Aug. 26 Ex Parte at 9, 10.

<sup>3</sup> In the *Notice*, the Commission observed that it has a pending proceeding to "review the totality of the circumstances test for evaluating whether broadcast stations and MVPDs are negotiating in good faith." *Notice* at note 8, citing *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, Notice of Proposed Rulemaking, 30 FCC Rcd 10327 (2015) (Totality of the Circumstances NPRM). The Commission acknowledged that "[s]ome of the issues raised in this NOI regarding negotiations between MVPDs and programmers in general are similar to issues raised in the Totality of the Circumstances NPRM. However, we direct parties wishing to comment on issues relating to retransmission consent

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announced that no additional rules were needed to ensure that parties negotiate in good faith for retransmission consent.<sup>4</sup> Apparently unhappy with this outcome, ACA has repackaged arguments made in response to the Totality of the Circumstances NPRM, labeled them with a different docket number, and called them proposals to promote independent and diverse programming. The proposals are not only misplaced in this docket (contrary to the Commission's clear instructions), but also are no more compelling now than when they were raised elsewhere.

ACA's chief complaint is that its members are entering into agreements with broadcasters and other programmers that involve more than one channel of broadcast and/or other programming.<sup>5</sup> According to ACA, these agreements with programmers "devour limited capacity that could instead be used to carry independent programmers or increase broadband performance."<sup>6</sup> To be clear, as NAB and countless other parties have discussed in numerous filings, broadcasters do not *require* any parties to enter into agreements for multiple channels of programming.<sup>7</sup> Essentially, then, this complaint is one about capacity constraints. But any such constraints are self-imposed by ACA members' own business decisions about whether and how to invest capital.

Increasingly, ACA reports, its members are *choosing not to invest* in their pay TV businesses, preferring instead to "invest[] primarily in their broadband business."<sup>8</sup> ACA President Matthew Polka has stated quite pointedly: "Video is just not important. Broadband is."<sup>9</sup> And as ACA recently observed in seeking yet another exemption from a rule designed to protect

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*negotiations* between broadcasters and MVPDs to file any comments on those issues in the Totality of the Circumstances NPRM docket." *Id.* (emphasis added).

<sup>4</sup> FCC Blog, An Update on Our Review of the Good Faith Retransmission Consent Negotiation Rules, Chairman Tom Wheeler, available at: <https://www.fcc.gov/news-events/blog/2016/07/14/update-our-review-good-faith-retransmission-consent-negotiation-rules> (Jul. 14, 2016, 10:37 AM). The announcement stated that "[b]ased on the staff's careful review of the record, it is clear that more rules in this area are not what we need at this point." *Id.* It explained that existing rules governing retransmission consent were quite broad, while "picking and choosing" specific behaviors could actually limit the FCC's ability to promote good faith negotiations. *Id.* Accordingly, the blog announcement made clear that the FCC "will not proceed at this time to adopt additional rules governing good faith negotiations for retransmission consent."

<sup>5</sup> ACA Aug. 26 Ex Parte at 2-5.

<sup>6</sup> *Id.* at 2.

<sup>7</sup> See, e.g., Comments of the National Association of Broadcasters, MB Docket No. 16-41, at 3-7 (Mar. 30, 2016) (NAB Comments).

<sup>8</sup> Letter to Marlene H. Dortch, FCC Secretary, from Thomas Cohen of Kelley Drye & Warren LLP, counsel to ACA, MB Docket Nos. 16-42 and 97-80 (Aug. 25, 2016) at 2 ("smaller MVPDs are limiting investments in their MVPD service and investing primarily to increase the capability and performance of their broadband services"). *Id.* at Attachment, p. 2 ("Most ACA members are not making substantial investments in their MVPD service. Instead ACA members are investing primarily in their broadband business.").

<sup>9</sup> Kyle Daly, *ACA President: 'Video is Just Not Important,'* SNL Kagan (Mar. 2, 2016). ACA Chairman Robert Gessner similarly observed that video is merely a "distraction." *Id.*

consumers,<sup>10</sup> although the cable industry's transition from analog to digital "has been going on for about twenty years," most ACA members are "still in the middle of this transition" with some still operating entirely analog systems.<sup>11</sup> ACA doesn't hold out much hope for its members' transition to digital, asserting that "some of them will never get there."<sup>12</sup>

The purported "lack" of channel capacity complained of in this proceeding—if accurate<sup>13</sup>—is the obvious result of ACA member companies' business decisions to devote their investment resources and bandwidth away from video to services where they see a better opportunity for earnings. Commission regulation of broadcasters and other programmers will not change the clear trajectory of ACA members' increasing focus on broadband upgrades—while equipment and facilities devoted to video service become further and further out of date. To the extent ACA's claims shine a light on a need for some form of intervention, it is with regard to their members' own continuing refusal to upgrade their facilities.

Respectfully submitted,



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Rick Kaplan  
General Counsel and Executive Vice President  
Legal and Regulatory Affairs

cc: William Lake, Michelle Carey, Susan Singer, Nancy Murphy, Martha Heller

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<sup>10</sup> Letter to Marlene H. Dortch, FCC Secretary, from Mary C. Lovejoy, Vice President of Regulatory Affairs, ACA, MB Docket Nos. 16-42 and 97-80 (July 26, 2016) (contending that cable operators with fewer than one million subscribers should be exempt from any new rules to promote consumer choice in navigation devices) ("ACA Set Top Box Ex Parte"). Recently, ACA members also have proposed that they be relieved of some or all aspects of the proposed broadband privacy rules, enhanced transparency requirements adopted in the Open Internet Order, and the online public file requirement, to name a few. See Comments of ACA, WC Docket No. 16-106, at 42-49 (May 27, 2016) (proposing various exemptions to proposed broadband privacy rules for "small providers"); Letter to Marlene H. Dortch, FCC Secretary, from Thomas Cohen of Kelley Drye & Warren LLP, counsel to ACA, GN Docket No. 14-28 (Mar. 14, 2016) at 3 ("ACA also advocated—and continues to advocate—that the Consumer & Governmental Affairs Bureau make permanent the temporary exemption [from enhanced transparency requirements] for smaller ISPs"); Comments of ACA, MB Docket No. 14-127, at 10-14 (Mar. 16, 2015) (proposing that existing public file exemptions for cable systems with fewer than 1,000 subscribers be expanded in the online public file context to exempt systems with fewer than 15,000 subscribers, and that member companies be permitted to delegate certain online filing obligations to third parties).

<sup>11</sup> ACA Set Top Box Ex Parte at 2.

<sup>12</sup> *Id.*

<sup>13</sup> As NAB has previously demonstrated, cable system capacity "has expanded, and is continuing to expand, at an impressive rate, doubling roughly every ten years." NAB Comments at 2-3, 8-9 *citing* Steven J. Crowley, Capacity Trends in Direct Broadcast Satellite and Cable Television Services (Oct. 8, 2013), available at: [http://www.nab.org/documents/newsRoom/pdfs/100813\\_Capacity\\_Trends\\_in\\_DBS\\_and\\_Cable\\_TV\\_Services.pdf](http://www.nab.org/documents/newsRoom/pdfs/100813_Capacity_Trends_in_DBS_and_Cable_TV_Services.pdf) (Channel Capacity Study); see also NAB Study Finds Pay-TV Carriage Capacity Not Constrained by Technological Barriers, NAB (Jan. 14, 2014), available at: <http://www.nab.org/documents/newsroom/pressRelease.asp?id=3283>.